

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

TRINITY HEALTH – MICHIGAN d/b/a  
ST. JOSEPH MERCY OAKLAND  
HOSPITAL

Respondent,

and

Case 07-CA-161375

COUNCIL 25, MICHIGAN AMERICAN  
FEDERATION OF STATE COUNTY AND  
MUNICIPAL EMPLOYEES, AFL-CIO,

Charging Party.

*Robert Buzaitis, Esq.*, for the General Counsel.  
*Daniel J. Bretz, Esq.* and *Brian D. Shekell, Esq.*,  
of *Detroit, Michigan*, for the Respondent.  
*Robert D. Fetter, Esq.*, of *Detroit, Michigan*,  
for the Charging Party.

DECISION

STATEMENT OF THE CASE

CHRISTINE E. DIBBLE, Administrative Law Judge. This case was tried in Detroit, Michigan, on July 16, 2016. The original charge in this case was filed by Michigan Council 25 and its affiliated Local 1820, American Federation of State, County, and Municipal Employees (AFSCME), AFL-CIO (the Union/Charging Party) on October 5, 2015. On January 29, 2016, the National Labor Relations Board (NLRB/the Board) for Region 7 issued the complaint and notice of hearing. Trinity Health-Michigan d/b/a St. Joseph Mercy Oakland Hospital (Respondent) filed a timely response.

The complaint alleges that about September 2015, Respondent failed to continue all the terms and conditions of the most recent collective-bargaining agreement (CBA) by unilaterally removing the classification of pharmacy technicians and the work performed by those employees from the recognized bargaining unit in violation of Section 8(a)(1) and (5) of the Act.<sup>1</sup>

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<sup>1</sup> The most recent CBA is effective from October 4, 2014 through June 30, 2018.

After the trial, the General Counsel, Respondent, and the Charging Party filed briefs, which I have read and considered.<sup>2</sup> Based on those briefs and the entire record, including the testimony of the witnesses and my observation of their demeanor, I make the following

### Findings of Fact

#### *Jurisdiction*

Respondent, a Michigan corporation with an office and place of business in Pontiac, Michigan (Pontiac facility), is engaged in the operation of an acute care hospital. During a representative 1-year period, Respondent derived gross revenues in excess of \$250,000 and purchased and received, at its Pontiac, Michigan facility goods and services valued in excess of \$5000 directly from points located outside the State of Michigan. Accordingly, I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and has been a healthcare institution within the meaning of Section 2(14) of the Act.

I also find, as Respondent also admits, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

#### *Overview of Respondent's Operation*

Respondent, a teaching community hospital, is part of the Trinity Health System (THS). THS is the second largest Catholic healthcare system in the United States with more than 89 hospitals throughout the nation. Respondent has approximately 2800 employees at its facility St. Joseph Mercy Oakland Hospital (SJMOH) in Pontiac, Michigan. Within SJMOH, Respondent employs 29 pharmacy technicians who work in pharmacy services. Pharmacy Services has both a retail and inpatient operation. There are five pharmacy technicians working on the retail side at SJMOH. These technicians perform duties similar to those in a retail drugstore such as CVS or Walgreens. Respondent's retail pharmacy technicians prepare, bottle, and label medication doses, assist walk-in customers, and help pharmacists get doses from stocked medications. SJMOH employs 24 pharmacy technicians in its inpatient pharmacy division. Inpatient pharmacy technicians have five primary functions: (1) compounding<sup>3</sup> drugs in the hospital IV room; (2) deliver medications to various areas of the hospital; (3) prepare medications at the pharmacy counter for distribution throughout the hospital; (4) stock medications in the Pyxis machine;<sup>4</sup> and (5) "handling" the controlled substance vault.

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<sup>2</sup> General Counsel's exhibits, Respondent's exhibits, and Charging Party's exhibits are identified as "GC Exh.," "R. Exh." and "CP Exh.," respectively. Joint exhibits are identified as "Jt. Exh." The hearing transcript is identified as "Tr." The General Counsel, Respondent, and Charging Party posthearing briefs are identified as "GC Br.," "R. Br.," and "CP Br.," respectively.

<sup>3</sup> Compounding is a method of mixing or altering the ingredients of a drug to "create a medication tailored to the needs of an individual patient." [www.fda.gov/drugs](http://www.fda.gov/drugs).

<sup>4</sup> The PYXIS machine automatically dispenses drugs for patients after a security code is entered by authorized hospital personnel.

The following management officials, employed by Respondent, are relevant to the complaint at issue: Ane J. McNeil (McNeil), vice president of resources administration; Virginia Chambo (Chambo), human resources business partner; and Kathleen Gaither (Gaither), director of pharmacy services east market. In her role as vice president resources administration, McNeil, among other duties, works to resolve labor management issues, assists in guiding grievances through to resolution, and engages in contract negotiations between Respondent and the Union. Chambo, among other tasks, provides support to Respondent's various departments on human resources' policy interpretations, policy procedures, and contracts. As director of pharmacy services, Gaither oversees the entire operation for pharmacy services at SJMOH and St. Mary Mercy Hospital in Livonia, Michigan. Daniel J. Bretz (Bretz), counsel for Respondent, represented its interests before this tribunal and also played a role in several meetings held with union officials about the impact that the licensing requirement had on pharmacy technicians' ability to remain in the bargaining unit.

### *Labor, Management, and the CBA*

Respondent and the Union have had a longstanding collective-bargaining relationship, culminating in successive bargaining agreements, the last of which is effective, by its terms, from October 4, 2014 to June 30, 2018, in the following bargaining unit originally certified as appropriate by the Board (GC Exhs. 10; Tr. 135):

All nonprofessional associates, including technical associates, carpenters, plumbers, electricians, boiler operators, painters, maintenance mechanics, technicians, health unit coordinators, clerks in the following departments: medical records, nursing services, laboratory, communications, buildings and grounds, physical therapy, radiology, food service and environmental services, and/or all classifications set forth in Article XIX, job titles and pay grades, but excluding public safety officers, registered associates, licensed associates, professional associates, clerical associates reporting to the business office, and all other clerical associates not specifically included herein.

The above recognition clause has been part of successive collective-bargaining agreements and has been unchanged since about 1971. Articles XVIII and XIX list, among other job titles and pay grades, that of "Pharmacy Tech In Pt Cert" and "Pharmacy Tech Out Pt Cert" at pay grade 11B. (GC Exh. 10.) The CBA's recognition clause excludes SJMO's approximately 1100 licensed employees (e.g., physicians, registered nurses, speech pathologists, radiology technicians). Although boiler operators and electricians are licensed positions, they were grandfathered into the bargaining unit because the positions were required to be licensed by state law, since 1965, before the initial CBA was negotiated.

At all material times, the Union has been the exclusive collective-bargaining representative of the unit described in the CBA's recognition clause. The Union represents about 620 of Respondent's 2800 SJMHO employees. During the period at issue, Carlos Bass (Bass), a supply chain technician, has been president of Local 1820 for at least the past 15 years. In his role as the president, Bass oversees the daily operation of local 1820, ensures Respondent complies with the CBA, and represents the bargaining unit members. Octave LeDuff (LeDuff) is vice president of Local 1820, Council 25. Toni Jordan (Jordan) works for Respondent as a

patient support technician; and is the Union's secretary, treasurer, and committee person. In her union position, Jordan takes notes at union meetings, maintains their "books," files grievances on behalf of the Union, and attends special conferences.<sup>5</sup> Mel Brabson (Brabson) and Jimmy Hearn (Hearn) are union representatives from Council 25.

*Change in licensing requirement for pharmacy technicians*

On September 23, 2014, Public Act 258 of 2014 (PA 285) was signed into law by the Governor of Michigan. PA 285 requires, among other acts, that pharmacy technicians practicing in Michigan obtain and possess a license from the Michigan Board of Pharmacy.<sup>6</sup> PA 285, section 17711 (1) reads,

A person shall not engage in the practice of pharmacy or serve as a pharmacy technician unless licensed or otherwise authorized by this article.

(GC Exh. 2.) The effective date of PA 285 was initially December 22, 2014. However, the date for the licensing requirement was postponed twice to June 30, 2015, and ultimately implemented on October 1, 2015.

*Meetings between Labor and Management on PA 285*

On October 20, 2014, Chambo and McNeil from Respondent's human resources department invited Jordan, Bass, and LeDuff to meet and discuss the new law requiring the licensure of pharmacy technicians. Bass and LeDuff were unable to attend. Consequently, on October 20, 2014, Chambo and McNeil met with Jordan and informed her that because PA 285 was passed by the Michigan legislature, the soon to be licensed pharmacy technician position would be excluded from the bargaining unit pursuant to the CBA's recognition clause.<sup>7</sup> Jordan was also provided with a copy of the applicable statute. After the meeting, Jordan sent an email to McNeil requesting a special conference to further discuss the impact of the licensing requirement on the pharmacy technicians. Chambo, Ben Carravallah (Carravallah)<sup>8</sup>, Bass, Brabson, Hearn, and Bryan were also copied on the email.<sup>9</sup> (R Exh. 3.)

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<sup>5</sup> Special conference is defined by Respondent as a meeting between management and union leadership to discuss topics of interest, share information, and reach resolution on disputed employment issues. (Tr. 154-155.)

<sup>6</sup> Michigan Licensing and Regulatory Affairs (LARA) is the state agency that regulates and enforces laws with respect to pharmacy and other applicable professions in Michigan. LARA also uses and enforces the United States Pharmacopeia (USP) 797 standards for pharmacological practice in Michigan.

<sup>7</sup> Although he did not attend the October 20, 2014 meeting, Bass testified that Jordan was not told in the meeting that the pharmacy technicians would be removed from the bargaining unit as a result of the licensing requirement. However, Jordan, who did attend the meeting, admitted that Respondent told her at the October 20 meeting that upon receiving their licenses the pharmacy technicians would be excluded from the bargaining unit pursuant to art. I of the CBA. (Tr. 28.) I credit Jordan's testimony on this point.

<sup>8</sup> Carravallah is employed by Respondent as a business partner in the human resources department.

<sup>9</sup> The evidence does not indicate whether "Bryan" is a first name or surname, nor the persons job title.

Respondent agreed to a special conference and on November 7, 2014, a meeting was held with Bass, Jordan, Hearn, Brabson, Bretz, McNeil, Chambo, and Carravallah. (R. Exh. 4.).<sup>10</sup> During the meeting, Respondent reiterated that because of the mandate in PA 285 that pharmacy technicians become licensed, they would be removed from the bargaining unit pursuant to the CBA's recognition clause which excludes licensed associates from the unit. The Union insisted that the pharmacy technicians should remain in the union after becoming licensed but Respondent refused noting it was contrary to the CBA's recognition clause. The parties could not resolve the issue so Hearn requested that Respondent agree to an expedited arbitration of the matter. Respondent agreed to allow the grievance to skip steps 1 and 2 of the grievance process and be heard at the step 3 grievance level. Brabson memorialized this agreement in a letter he sent to McNeil dated November 14, 2014, in which he noted the expedited arbitration schedule; and Respondent's position that when the pharmacy technicians became licensed, they would be removed from the bargaining unit in accordance with Respondent's interpretation of the CBA's recognition clause. (R. Exh. 7.)

On December 19, 2014, the Union and Respondent held another special conference to continue the discussion about the impact of PA 285 on the pharmacy technicians and other agenda items. During the meeting, Respondent informed the Union that the State of Michigan had delayed implementation of the licensing requirement for pharmacy technicians to June 2015.

*Union Files Grievance on March 10, 2015*

In accordance with the agreement between the parties allowing for an expedited arbitration schedule, on March 10, 2015, the Union filed a grievance at the step 3 level. The grievance alleged that Respondent violated article I, section 1 and article XVIII of the CBA (including any applicable state and federal laws) because "[a]ssociates at all cost would like to remain in the current bargaining unit. The associates have been covered under A.F.S.C.M.E. local 1820 since 1971." (R. Exh. 12.) The Union also requested that Respondent "cease and desist the removal of techs from the bargaining unit." Id.

On April 9, 2015, Chambo and Carravallah met with Bass to discuss the grievance filed by the Union on March 10, 2015. Chambo provided undisputed testimony that Bass did not present arguments or support for the allegations in the grievance; and demanded only that she respond to the grievance. By written response dated May 4, 2015, Chambo denied the grievance by noting in part,

Based on the requirements of Michigan law, effective June 30, 2015 the job descriptions and titles for non-licensed "Pharmacy Technician In-Patient" and non-licensed "Pharmacy Technician Out-Patient" will be eliminated. In advance of that date, the Hospital will post and fill the role of "Licensed Pharmacy Technician Specialist" which complies with the Michigan licensing law. Under the plain language of the collective bargaining agreement, the Licensed Pharmacy Technician Specialist role will not be included in the bargaining unit. The grievance is denied."

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<sup>10</sup>Alvin Bowman, human resources business partner, was initially scheduled to attend the special conference but for unknown reasons was not present.

(R. Exh. 13) By email date May 6, 2015, Jordan notified McNeil of the Union's intent to arbitrate the grievance. She copied Bass, Chambo, and Carravallah on the email. (R. Exh. 9.) Despite its notice of intent to arbitrate, there is no evidence that the Union pursued the grievance in arbitration.

*Continued Discussions Between Labor, Management, and Employees about PA 285*

In June 2015, Respondent engaged in talks with the Union about the impact of the licensure requirement on the pharmacy technicians' ability to remain in the unit. At some point in the discussions, Respondent offered to allow the pharmacy technicians to remain in the unit if the Union consented to allowing Respondent to outsource the medical transcriptionist position. In August or September 2015, the Union rejected Respondent's proposal. (Tr. 49.)<sup>11</sup>

In November 2014, December 23, 2014, June 13 and September 15, 2015, Respondent created a "Pharmacy Technician Licensure —Frequently Asked Questions" sheet (FAQ sheet) for distribution to the pharmacy technicians. The November and December 2014, versions do not mention that post licensure the positions would be nonunion, nor that there would be a change in the job title. In the June 13 and September 15, 2015, FAQ sheets pharmacy technicians were first notified that the "Hospital will utilize the following titles as non-union colleagues." (R. Exh. 11.)

On September 17, 2015, Respondent held two meetings with the pharmacy technicians to inform them that due to the new licensure mandate, if they wanted to remain in their positions, they would have to become licensed, reapply for their positions, and be removed from the bargaining unit.<sup>12</sup> Every pharmacy technician became licensed, reapplied, and was rehired for their position. Through witness testimony, the parties produced competing views on whether the pharmacy technicians experienced significant change in their job duties after October 1, 2015, the effective date of the licensure requirement.

The General Counsel argues that despite being licensed, the pharmacy technicians did not experience any substantive changes in their duties. (GC Br. 6) The Union also contends that

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<sup>11</sup> Respondent objected to this testimony by arguing that it was settlement discussions and therefore shouldn't be allowed. The General Counsel disputes the testimony was a part of settlement discussions, and argues instead the discussions were part of the contract negotiations. Consequently, the General Counsel contends that the testimony is necessary to counter Respondent's defense that its position never changed on removing the licensed pharmacy technicians from the bargaining unit. Based on the parties' oral arguments at the hearing, I allowed the testimony after agreeing with the General Counsel and Charging Party and determining that the discussion at issue was: (1) part of a bargaining proposal; and (2) the testimony was proffered to show when the Union had knowledge of the alleged violation. See also *Zurich American Insurance Co. v. Watts Industries*, 417 F.3d 682, 689 (7th Cir. 2005) (quoting *Vulcan Hart Corp. v. NLRB*, 718 F.2d 269, 277 (8th Cir. 1983)).

<sup>12</sup> Pharmacy technician Jennifer Little (Little) testified that as early as June 2015, she became aware that her position would require licensure and she would have to apply for an open licensed pharmacy technician position. (Tr. 76–79.) She was also aware that the position would result in her removal from the bargaining unit. (Tr. 79.)

inpatient pharmacy technicians had no change in their duties, while retail side pharmacy technicians saw only one tangible change in to their job functions, the implementation of a “perpetual inventory system.” Moreover, the Union noted “there is no evidence how this new inventory system relates to the license requirement in anyway (sic); it would have been implemented irrespective of the license requirement. It was not implemented until about three months prior to the hearing, or six months after the employer removing the pharmacy techs from the unit.” (CP Br. 6.)

Respondent insists that the licensure required significant changes in the pharmacy technicians’ job duties. In response to questions on how the pharmacy technician duties have changed postlicensure, Gaither testified that job requirements that are now set by the State of Michigan have resulted in the following “significant changes” in the licensed pharmacy technician job: conduct investigations into controlled drug discrepancies; utilization of a perpetual inventory system (PYXIS); required retraining and recertification measures in compliance with USP 797 standards; more stringent safety protocols for donning clothing and equipment; conduct sterile fingertip testing; revised cleaning techniques of the IV rooms; and pass a criminal background check.

I find, however, that the evidence does not show there have been significant changes to the licensed pharmacy technicians’ job duties. The evidence established that prior to the licensure mandate, only one pharmacy technician conducted investigations into controlled drug discrepancies; and that continued even after the licensing requirement became effective. Mindy Mazurek (Mazurek) provided undisputed testimony that there is a specific pharmacy technician that performs narcotics diversion investigation and the same person continued performing that function after the licensure requirement became effective. She also credibly testified that as a licensed pharmacy technician her compounding duties, delivery of medications, PYXIS duties, and steps for handling narcotics inventory remained the same. Pharmacy Technicians Barbara Harrington (Harrington) and Little corroborated Mazurek’s testimony that their job duties essentially remained the same after they were licensed. Gaither’s testimony touting the implementation of the PYXIS as a significant change in the pharmacy technicians’ job duties is in direct contrast to the credible testimony of Mazurek, Little, and Harrington. Moreover, the Charging Party correctly notes in its brief that implementation of the PYXIS would have occurred irrespective of the licensure requirement.

Respondent noted that licensed pharmacy technicians have to undergo retraining and recertification measures to ensure compliance with the USP 797 standards. However, Harrington provided undisputed testimony that pharmacy technicians have been required to take continuing education classes for the past 10 or 12 years. (Tr. 218.) In arguing that the job function has changed significantly for the licensed pharmacy technicians, Respondent notes that they are required to follow more stringent safety procedures and cleaning techniques. While this might be true, it is not a significant change in their actual duties. A license is not required to implement stricter safety protocols for donning clothing and cleaning medical equipment for pharmacy technicians or any other healthcare worker. Last, the requirement that pharmacy technicians pass a criminal background check does not change their job duties but rather is a matter of a change in

qualification for the position. Last, the evidence is undisputed that Respondent did not train the newly licensed pharmacy technicians on any alleged new responsibilities.<sup>13</sup>

Accordingly, I find that the evidence established the pharmacy technician job duties underwent minimal change after they became licensed pharmacy technicians.

Effective October 1, 2015, the rehired licensed pharmacy technicians were removed from the unit and Respondent ceased deducting and remitting union dues for those employees. Moreover, their medical and dental insurance premiums increased to the nonunion rate in January 2016.

### Discussion and Analysis

#### *Complaint is timely under Section 10(b) of the Act*

Prior to addressing the merits of the complaint, I must rule on Respondent's request that the complaint be dismissed because it is untimely.

Respondent argues that the unfair labor practice charge in this matter is untimely because it is not based on a "purported violation that occurred on or after April 5, 2015." (R. Br. 16.) Specifically, Respondent contends that the Union was aware as early as October 20, 2014, that the State of Michigan passed a law requiring licensure of the pharmacy technician position, thus subjecting it to exclusion from the bargaining unit. (R. Br. 16–17.) According to Respondent, "The Union was advised beginning on October 20, 2014 that the Hospital had to follow state law by requiring Pharmacy Technicians to obtain a license and that the CBA's express terms excluded the position from the unit. This notice was clear and unequivocal." (R. Br. 19.)

The General Counsel counters that the Board has consistently held that it is "the date of the allegedly unlawful act rather than a proposed effective date that will trigger the sixth-month period." (R. Br. 9, quoting *Postal Service Marina Mail Processing Center*, 271 NLRB 397, 400 (1984)). Consequently, the General Counsel notes that the acts at issue did not occur until late September 2015 when Respondent "rehired" the affected employees into the licensed pharmacy technician classification, removed them from the bargaining unit, and on October 1, 2015, ceased deducting their union dues. *Id.*

Section 10(b) of the Act disallows the issuance of complaints "based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon" the charged party. 29 U.S.C. §160(b). The 10(b) period begins to run when the aggrieved party has "clear and unequivocal notice of a violation." *Leach Corp.*, 312 NLRB 990, 991–992 (1993), *enfd.* 54 F.3d 802 (D.C. Cir. 1995). The party raising the 10(b) affirmative defense has the burden of proving the aggrieved party had actual or constructive notice of the violation. See, e.g., *Castle Hill Health Care Center*, 355 NLRB 1156, 1191 (2010); see also *St. Barnabas Medical Center*, 343 NLRB 1125, 1127 (2004) (knowledge is

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<sup>13</sup> While Gaither testified that the new standards requires licensed pharmacy technicians to take continuing education classes, Harrington provided undisputed testimony that she has always taken continuing education classes for the position of pharmacy technician.

imputed when party first has “knowledge of the facts necessary to support a ripe unfair labor practice.”). Moreover, the statute of limitations does not begin to run until the unfair labor practice occurs. *Leach Corp.*, 312 NLRB 990, 991 (1993), quoting *NLRB v. Al Bryant, Inc.*, 711 F.2d 543, 547 (3d Cir. 1983).

Based on the facts of this complaint and well-settled case law, it is clear, that late September 2015 or October 1, 2015, is when the unfair labor practice occurred. October 1, 2015, is the date that the pharmacy technicians were excluded from the bargaining unit; and the point at which Respondent discontinued deducting their union dues. The charge in this case was filed 4 days later, on October 5, 2015, well within the 6-month time period established in Section 10(b) of the Act.

Accordingly, I find that Respondents argument that the complaint at issue it untimely is without merit.

#### Section 8(a)(1) and (5) Violation of the Act

The good-faith standard is used by the courts and the Board to determine if the parties have met their obligation to bargain under the Act. The Board takes a case-by-case approach in assessing whether parties have met, conferred, and negotiated in good faith. *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940) (the Court adopted the “good faith” standard for an employer’s conduct); *St. George Warehouse, Inc.*, 349 NLRB 870 (2007) (the Board reviews the totality of the employer’s conduct in deciding if the employer has satisfied its obligation to confer in good faith). The duty to bargain, however, only arises if the changes are “material, substantial and significant.” *Alamo Cement Co.*, 281 NLRB 737, 738 (1986); *Flambeau Airmold Corp.*, 334 NLRB 165, 171 (2001). The General Counsel bears the burden of establishing this element of the *prima facie* case. *North Star Steel Co.*, 347 NLRB 1364, 1367 (2006).

An employer may not change the terms and conditions of employment of represented employees without providing their representative with prior notice and an opportunity to bargain over such changes. See *NLRB v. Katz*, 369 U.S. 736, 747 (1962). In order to find that an employer made unilateral changes to an employee benefit in violation of the Act, it must be shown that (1) material changes were made to the employees’ terms and conditions of employment; (2) the changes involved mandatory subjects of bargaining; (3) the employer failed to notify the union of the proposed changes; and (4) the union did not have an opportunity to bargain with respect to the changes. *San Juan Teachers Assn.*, 355 NLRB 172, 175 (2010). *Alamo Cement Co.*, supra; *Flambeau Airmold Corp.*, supra.

#### *Unilateral Removal of Employees’ Reclassification And Work are Mandatory Subjects*

The General Counsel alleges that Respondent violated Section 8(a)(1) and (5) of the Act when, since about September 2015, Respondent unilaterally removed the pharmacy technician classification and the work they performed from the bargaining unit, thereby by failing and refusing to bargain collectively and in good faith with the Union. According to the General Counsel, the evidence establishes that Respondent violated the Act regardless of whether Respondent’s action was “an alteration in the scope of the unit or a transfer of unit work.” citing

*Mt. Sinai Hospital*, 331 NLRB 895, 908 (2000). In support of its argument, the General Counsel contends: (1) the reclassification of the pharmacy technician position is a mandatory subject of bargaining; (2) Respondent did not change the pharmacy technicians' duties after they became licensed; and (3) neither the State of Michigan licensure mandate, nor the CBA recognition clause, required Respondent to exclude pharmacy technicians from the bargaining unit.

Respondent's counters that there is no violation of Section 8(a)(1) and (5) of the Act because: (1) Respondent is not required to bargain over whether licensed pharmacy technicians should be included in the unit because the recognition clause is a permissive subject of bargaining; (2) the "clear and unambiguous" language of the CBA requires exclusion from the unit of "licensed associates"; and (3) even assuming the issue is a mandatory subject of bargaining, the Union has waived its right to demand bargaining over the definition of the unit because it previously agreed to the proper scope of the unit.<sup>14</sup>

In *Hill-Rom Co. v. NLRB*, 957 F.2d 454, 457 (7th Cir. 1992), the court acknowledged that there is only a subtle distinction between a mandatory versus permissive subject of bargaining. Based on my review of case law, it appears that often the distinction is so subtle that it is imperceptible to the Board, courts, and litigants.<sup>15</sup> Nonetheless, in *Hill-Rom, Co., Inc.*, the court noted that possible subjects of collective bargaining fall into three broad categories: mandatory subjects, permissive subjects, and illegal subjects.

In *Axelson, Inc.*, 234 NLRB 414, 415 (1978), the Board defined mandatory subjects of bargaining as,

those comprised in the phrase "wages, hours, and other terms and conditions of employment" as set forth in Section 8(d) of the Act. While the language is broad, parameters have been established, although not quantified. The touchstone is whether or not the proposed clause sets a term or condition of employment or regulates the relation between the employer and its employees.

See also *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 210, 85 S.Ct. 398, 402, 13 L.Ed.2d 233 (1964); *Facet Enterprises, Inc. v. NLRB*, 907 F.2d 963, 975 (10th Cir. 1990). The court in *Hill-Rom Co., Inc.*, noted that permissive subjects are "those which fall outside the scope of § 8(d) and cannot be implemented by the employer without union or Board approval"; and illegal subjects are "those proscribed by federal, or where appropriately applied, state law." *Id.* at 457.

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<sup>14</sup> In anticipation of the General Counsel relying on *Nexstar Broadcasting*, 363 NLRB No. 32 (2015), to support its case, Respondent argues that it is an inapposite decision. I do not need to address this argument because, although counsel for the Charging Party mentioned the case in his brief, the counsel for the General Counsel did not rely on nor cite *Nextstar Broadcasting* as part of the theory of the General Counsel's case.

<sup>15</sup> In *Hill-Rom, Co.*, the dissent aptly wrote, "Cases, including decisions by our superiors in the judicial hierarchy, establish that jurisdictional questions are permissive subjects of bargaining and that assignment disputes are mandatory subjects of bargaining. Neither the NLRB nor our court can do anything about this. Yet when the same facts can be put in either category with equal plausibility, the distinction collapses." *Id.*, at 460.

I find that Respondent's removal of the classification of pharmacy technicians and the work performed by them is a mandatory subject of bargaining because it relates to wages, hours and other terms and conditions of employment. Wages have been defined broadly by the courts and the Board. *Mission Foods*, 350 NLRB 336 (2007) (employer violated the Act by denying structural wage increase because it is a term and condition of employment); *Laurel Bay Health & Rehabilitation Center*, 353 NLRB 232 (2008) (merit increase is a mandatory subject of bargaining); *United Refining Co.*, 327 NLRB 795 (1999) (change in wage rate is a mandatory subject of bargaining); *NLRB v. Katz*, at 746 (merit wage increase is a mandatory subject of bargaining). Respondent acknowledged that reclassifying the pharmacy technician positions might have an effect on their wages and benefits. (R. Exh. 11.) Moreover, licensed certified pharmacy technician Little gave undisputed testimony that the portion she had to pay for her healthcare and dental premiums increased substantially because Respondent reclassified her into a nonunion position. The impacted employees' salaries and benefits are tied to their job classifications. Consequently, implementation of unilateral changes to the pharmacy technicians' job classifications and their removal from the bargaining unit significantly impacts the union's ability to represent its unit employees in disputes that are "those most essential of employee concerns—rates of pay, wages, hours and conditions of employment." *Arizona Portland Cement Co.*, 302 NLRB 36, 44 (1991). See also *Fry Foods, Inc.*, 241 NLRB 76, 88 (1979) ("reclassification of a position from a bargaining unit job to a nonunit job is a mandatory subject of collective bargaining if the reclassification has an impact on bargaining unit work.")

Second, I agree with the General Counsel that neither PA 285 nor the CBA recognition clause requires Respondent to exclude the licensed pharmacy technicians from the bargaining unit. Despite Respondent's contention that the language of the CBA clearly and unambiguously forces licensed pharmacy technicians out of the unit, I find this argument is not supported by the facts. It is undisputed that the CBA excludes generally "licensed associates" from the bargaining unit. However, the language does not specifically require the removal of licensed pharmacy technicians. The job pharmacy technician describes a specific position known to the parties. Adding a license requirement to the pharmacy technician position does not change anything in terms of the inclusion or exclusion of those employees from the bargaining unit. It just means they have a license. Moreover, Respondent's focus on the state mandated licensing requirement is misplaced because state law is not controlling in Board matters.

I also find that Respondent did not significantly alter the pharmacy technicians' duties after they became licensed. Several of the job changes that Gaither identified are either anticipated or did not occur until months after the pharmacy technicians were licensed and removed from the bargaining unit. She also testified that the pharmacy technicians would be able to perform the anticipated future responsibilities because they would occur under a different job classification. (Tr. 104.) Moreover, Gaither admitted that "the job description is always a work in progress" and noted that these were changes management was "looking at."

Gaither also acknowledged that the delivery pharmacy technicians performed the same job functions after the licensure requirement became effective. (Tr. 110.) Her contention that the PYXIS duties involved a significant change for to the licensed pharmacy technician duties is likewise discounted because the pharmacy technician overseeing the narcotic vault essentially continued to perform the same functions as before he/she was licensed, except he/she also

investigates any discrepancies that arise with PYXIS. However, there is no evidence that PA 285 mandated that a licensed pharmacy technician had to perform this function.

The differences in the added duties articulated by Respondent are not significant and insufficient to counter my finding that the job functions of the pharmacy technicians' pre and postlicensure were substantially the same. This finding is reinforced by the fact that Respondent saw no need to train the newly licensed pharmacy technicians on any new responsibilities.

Also, undermining Respondent's argument is the fact that Respondent has allowed their boiler operators and electricians to remain in the bargaining unit despite being licensed. Respondent contends the circumstances surrounding those positions justifies allowing them to remain in the unit despite being licensed positions because they were explicitly included in the recognition clause of the CBA; and since 1965 the positions have been required to be licensed by state law which was before the initial CBA was negotiated. However, this argument is irrelevant. The focus should be on whether the duties of the licensed pharmacy technicians are sufficiently dissimilar to the bargaining unit positions. See *Bay Shipbuilding Corp.*, 263 NLRB 1133, 1140 (1982), *enfd.* 721 F.2d 187 (7th Cir. 1983) ("When, as here, an employer attempts to justify removing a particular group or groups from the coverage of a collective-bargaining agreement or relationship, it has the burden of showing that the group is sufficiently dissimilar from the remainder of the unit so as to warrant that removal"). Moreover, as previously discussed, it is clear that the pharmacy technician position was substantially unchanged after it became a licensed position. There was credible testimony from three current licensed pharmacy technicians that their duties were substantially the same after becoming licensed. The Board has consistently held that the "question of whether a job classification is included in the unit is based on the job content and not the job title." *Bay Shipbuilding Corp.* at 834; *Texaco Port Arthur Works Employees Federal Credit Union*, 315 NLRB 828, 830 (1994).

### *The Union Did Not Waive its Right to Bargain*

The Respondent contends that the Union waived its right to bargain because the "Union bargained over, and agreed to, the definition of the unit which expressly excludes licensed associates." (R. Br. 20)

An employer to a contractual agreement may unilaterally take certain actions that result in changes to the terms and conditions of employment if there has been a "clear and unmistakable" waiver of the Union's right to bargain over the changes. *Pavilions at Forrestal*, 353 NLRB 540 (2008) (impasse irrelevant where employer unilaterally implemented new health insurance plan without providing union information, notice and opportunity to bargain concerning new plan); *Laurel Bay Health & Rehabilitation Center*, 353 NLRB 232 (2008) (employer prematurely declared impasse and unilaterally implemented changes in health insurance and other benefits where union requested and employer agreed to schedule subsequent bargaining session, union indicated willingness to "look at other plans," and union stated that it would prepare counterproposal). The "clear and unmistakable" standard requires that the contract language is specific, or it must be shown that the subject alleged to have been waived was fully discussed by the parties and the party alleged to have waived its rights did so explicitly

and with the full intent to release its interest in the matter. *Allison Corp.*, 330 NLRB 1363, 1365 (2000); *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

As previously discussed, I do not find that the CBA's language unambiguously and explicitly excludes licensed pharmacy technicians from the bargaining unit. While the CBA does explicitly exclude "licensed associates," there is no mention of the exclusion of licensed pharmacy technicians. Moreover, the inclusion in the bargaining unit of licensed boiler operators and licensed electricians injects a degree of ambiguity into the recognition clause's definition of "licensed associate." Consequently, I find that the evidence is insufficient to find that the Union explicitly waived its rights with the full intent to release its interest in the matter.

Accordingly, I find that Respondent, by unilaterally removing the classification of pharmacy technicians and the work performed by those employees from the bargaining unit, violated Section 8(a)(1) and (5) of the Act.

#### CONCLUSIONS OF LAW

1. By unilaterally removing the classification of pharmacy technicians and the work performed by those employees from the recognized bargaining unit, Respondent has failed to continue all the terms and conditions of the collective-bargaining agreement and has been failing and refusing to bargain collectively and in good faith in violation of Section 8(a)(1) and (5) of the Act.

2. The above violations constitute unfair labor practices that affect interstate commerce within the meaning of the Act.

3. Respondent has not otherwise violated the Act.

#### REMEDY

Having found that Respondent committed the unfair labor practices set forth above, I shall order it to cease and desist from its unlawful conduct and to post an appropriate notice and take other affirmative action designed to effectuate the purposes of the Act. More specifically, Respondent will be ordered to restore the status quo ante with respect to the unit status of the pharmacy technicians and make the affected employees whole for any loss of earnings and benefits they may have suffered as a result of Respondent's actions. Respondent shall also be ordered to remit to the Charging Party the dues that should have been checked-off pursuant to dues check-off authorizations, with interest in accordance with Board policy. Any computation of monies owed to such employees shall be made in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), *enfd.* 444 F.2d 502 (6th Cir. 1971).

On these findings of fact and conclusions of law, and on the entire record herein, I issue the following recommended<sup>16</sup>

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<sup>16</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulation, the findings, conclusions and recommended order herein shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be waived for all purposes.

## ORDER

The Respondent, Trinity Health-Michigan d/b/a St. Joseph Mercy Oakland Hospital,  
 5 Pontiac, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Modifying an existing contractual bargaining unit without the consent of the  
 10 Union.

(b) Refusing to bargain with, or withdrawing recognition from, the Union as the  
 exclusive bargaining representative of the affected employees.

(c) Refusing or failing to apply the terms and conditions of its existing collective-  
 bargaining agreement with the Union.

(d) Unilaterally removing the classification of pharmacy technicians and the work  
 performed by those employees from the bargaining unit.

(e) In any like or related manner interfering with, restraining, or coercing employees  
 in the exercise of right guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from a request, bargain collectively with the Union as the  
 exclusive bargaining representative of the pharmacy technicians employed by Respondent.

(b) Apply the terms of the existing collective-bargaining agreement to the affected  
 30 employees.

(c) Immediately restore the status quo ante with respect to the unit status of the pharmacy  
 technicians and make the affected employees whole for any loss of earnings and benefits they  
 may have suffered as a result of Respondents actions. Respondent shall also be ordered to remit  
 35 to the Charging Party the dues that should have been checked-off pursuant to dues check-off  
 authorizations, with interest in accordance with Board policy. Any computation of monies owed  
 to such employees shall be made in accordance with *Ogle Protection Service*, 183 NLRB 682  
 (1970), enf. 444 F.2d 502 (6th Cir. 1971).

(d) Preserve and, within 14 days of a request, or such additional time as the Regional  
 Director may allow for good cause shown, provide at a reasonable place designated by the Board  
 or its agents, all payroll records, social security payment records, timecards, personnel records  
 and reports, and all other records, including an electronic copy of such records if stored in  
 electronic form, necessary to analyze any monies due under the terms of this order.

(e) Within 14 days after service by the Region, post at all the facilities covered by its  
 bargaining agreement with the Union, including the Pontiac, Michigan facility, copies of the

attached notice marked "Appendix."<sup>17</sup> Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed at those facilities by Respondent at any time since September 2015.

(f) Within 21 days after service by the Region file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: Washington, D.C. May 25, 2017



Christine E. Dibble (CED)  
Administrative Law Judge

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<sup>17</sup> If this order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## **APPENDIX**

### **NOTICE TO EMPLOYEES**

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### **FEDERAL LAW GIVES YOU THE RIGHT TO**

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities.

**WE WILL NOT** do anything that interferes with these rights.

Michigan Council 25 and its affiliated Local 1820, American Federation of State, County, and Municipal Employees (AFSCME), AFL-CIO (Union) is the exclusive collective-bargaining representative of the following unit (the unit):

All nonprofessional associates, including technical associates, carpenters, plumbers, electricians, boiler operators, painters, maintenance mechanics, technicians, health unit coordinators, clerks in the following departments: medical records, nursing services, laboratory, communications, buildings and grounds, physical therapy, radiology, food service and environmental services, and/or all classifications set forth in Article XIX, job titles and pay grades, but excluding public safety officers, registered associates, licensed associates, professional associates, clerical associates reporting to the business office, and all other clerical associates not specifically included herein.

**WE WILL NOT** unilaterally remove the classification and work of “pharmacy technician” from the unit.

**WE WILL NOT** refuse to meet and bargain collectively and in good faith with your Union any proposed changes in wages, hours and working conditions before putting such changes into effect.

**WE WILL NOT** in any like or related manner interfere with your rights under Section 7 of the Act.

**WE WILL NOT** fail and refuse to bargain collectively and in good faith with the Union as your representative of the unit.

**WE WILL**, if requested by the Union, rescind any or all changes to your terms and conditions of employment that we made without bargaining in good faith with the Union, including returning the classification and work of “pharmacy technician” to the same status as it was prior to our unilateral decision to remove the classification from the unit.

**WE WILL** pay employees for the wages and other benefits lost because of the changes to terms and conditions of employment that we made without bargaining collectively and in good faith with the Union.

**WE WILL** remit to the Union dues that should have been checked-off as a result of the changes to your terms and conditions of employment that we made without bargaining with the Union.

TRINITY HEALTH-MICHIGAN d/b/a  
ST. JOSEPH MERCY OAKLAND HOSPITAL  
(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

National Labor Relations Board, Region 7  
Patrick V. McNamara Federal Building  
477 Michigan Avenue, Room 300  
Detroit, Michigan 48226  
(313) 226-3200, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at [www.nlr.gov/case/07-CA-161375](http://www.nlr.gov/case/07-CA-161375) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**  
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (313) 335-8042.